IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WAYLAND TO,

Petitioner,

v.

A. P. KANE, Acting Warden of the Correctional Training Facility,

Respondent.

/

No. C 05-1001 JSW (PR)

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

(Docket no. 3)

This matter comes before the Court on consideration of Respondent A.P. Kane's ("Respondent") motion to dismiss the petition for writ of habeas corpus filed by Petitioner Wayland To ("Petitioner"). Having considered the motion, the opposition thereto, and relevant legal authority, the motion is DENIED.

BACKGROUND

According to the petition, Petitioner was convicted of aiding and abetting murder in Alameda County Superior Court and was sentenced to fifteen years-to-life. In this habeas action, Petitioner does not challenge his conviction, but instead challenges the execution of his sentence. Petitioner contends that the denial of parole by the Board of Prison Terms ("BPT") during parole suitability proceedings in 2004 violated his rights to due process and equal protection. He alleges that he has exhausted state judicial remedies as to all of the claims raised in his federal petition.

Petitioner filed his federal habeas petition on March 9, 2005. On July 21, 2005, Respondent filed a motion to dismiss the petition on the ground that recent California Supreme Court authority interpreting California's parole scheme establishes that

Petitioner has no federally protected liberty interest in parole and, therefore, the Court lacks jurisdiction over the matter. Petitioner has filed an opposition to the motion to dismiss, arguing that Ninth Circuit precedent finding a protected liberty interest in California's parole scheme remains the applicable law.

ANALYSIS

In general, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 7 (1979). However, "a state's statutory scheme, if it uses mandatory language, 'creates a presumption that parole release will be granted' when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." *McQuillion v. Duncan*, 306 F.3d 895, 901 (9th Cir. 2002) (citing *Board of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987); *Greenholtz*, 442 U.S. at 12).

The California statutory provision at issue provides, in pertinent part, that "[t]he panel or the board, sitting en banc, *shall* set a release date *unless* it determines that the gravity of the current convicted offense or offenses ... is such that consideration of the public safety requires a more lengthy period of incarceration for this individual and that a parole date, therefore, cannot be fixed ... ." Cal. Penal Code § 3041(b) (emphasis added). This "shall-unless" language is similar to the statutes that were at issue in *Allen* and *Greenholtz*. *See Allen*, 482 U.S. at 376 ("*Subject to the following restrictions*, the board *shall* release on parole ... any person confined in the Montana state prison or the women's correction center ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or the community.") (quoting Mont. Code Ann. § 46-230201 (1985) (emphasis added and in original); *Greenholtz*, 442 U.S. at 11 ("[w]henever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release *unless* it is of the opinion that his release should be deferred because ... ") (quoting Neb. Rev. Stats. § 83-1,114(1) (1976)) (emphasis added).

Recognizing the similarity between California's statutory scheme and the statutory scheme at issue in *Allen* and *Greenholtz*, the Ninth Circuit has held that "California's parole scheme gives rise to a cognizable liberty interest in release on parole. The scheme creates a presumption that parole release will be granted unless the statutorily defined determinations are made." *McQuillion*, 306 F.3d at 902 (internal quotations and citations omitted). That court reiterated this holding in *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003) ("[I]t is clear that "California's parole scheme gives rise to a cognizable liberty interest in release on parole.") (quoting *McQuillion*, 306 F.3d at 902).

Respondent contends that the California Supreme Court's decision in *In re Dannenberg*, 34 Cal. 4th 1061 (2005) undermines the Ninth Circuit's holdings in *Biggs* and *McQuillion*, and Respondent relies on *Sass v. California Board of Prison Terms*, 376 F. Supp. 2d 975 (E.D. Cal. 2005) in support of this argument. This Court disagrees with the *Sass* court's conclusion that the holding in *Dannenberg* clearly demonstrates California's parole scheme is not mandatory. The issue presented in *Dannenberg* was whether the BPT was required to set uniform parole dates under Section 3041(a) before it determined whether a particular inmate was suitable for parole under 3041(b). *See Dannenberg*, 34 Cal. 4th at 1069, 1077. It concluded the answer to that question was no. *Id.* at 1096. However, the *Dannenberg* court used language throughout the opinion which suggests that it presumed an inmate retained a protected liberty interest in the possibility of parole. *See, e.g., id.* at 1094 (noting continued reliance on commitment offense "might thus also contravene the inmate's constitutionally protected expectation of parole"), 1095 n.16 ("well established principles" regarding parole discretion with deferential judicial oversight "define and limit the *expectancy* in parole from a life sentence *to which due process interests attach*"). Furthermore, California courts addressing the issue post *Dannenberg* continue to assume a protected liberty interest exists. *See In re Scott*, 133 Cal. App. 4th 573 (2005); *In re DeLuna*, 126 Cal. App. 4th 585 (2005).

Accordingly, this Court finds itself in agreement with a majority of courts that have considered the impact of *Dannenberg* on the issue presented by Respondent's motion and cannot find that the *Dannenberg* opinion represents a clear holding that California's parole scheme is not mandatory. *See, e.g., Blankenship v. Kane*, 2006 WL 515627 at *3 (N.D. Cal. Feb. 28, 2006) (citing cases). Accordingly, under the holdings of *McQuillion* and *Biggs*, Petitioner has a federally protected liberty interest in parole, the Court has jurisdiction over this matter, and Respondent's motion is DENIED.

CONCLUSION

In light of the Court's denial of Respondent's motion, within ***sixty (60)*** days from the date of this order Respondent must file and serve on Petitioner an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent must file with the answer a copy of all portions of the administrative record that are relevant to a determination of the issues presented by the petition.

If Petitioner wishes to respond to the answer, he must do so by filing a traverse with the Court and serving it on Respondent within ***thirty (30)*** days from the date he is served with the answer.

IT IS SO ORDERED.

Dated: March 29, 2006

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE